

119 Grand Realty LLC v Acevedo

2011 NY Slip Op 33527(U)

January 10, 201G

Civ Ct, NY County

Docket Number: 67050/08

Judge: Sabrina B. Kraus

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CIVIL COURT OF THE CITY OF NEW YORK
 COUNTY OF NEW YORK: HOUSING PART R

 119 GRAND REALTY LLC, X

Petitioner-Landlord

HON. SABRINA B. KRAUS

-against-

DECISION & ORDER
Index No.: L&T 67050/08

DULCE ACEVEDO a/k/a DULCE MALDONADO
 119 AUDUBON AVENUE, APT 5H
 NEW YORK, NY 10032,

Respondent-Tenant

CLARA PENA, ATHONY ACEVEDO
 “JOHN DOE” & “JANE DOE”

Respondents-Undertenants

 X

BACKGROUND

This summary holdover proceeding was commenced by **119 GRAND REALTY LLC** (Petitioner) against **DULCE ACEVEDO** (Respondent), the rent stabilized tenant of record, seeking to recover possession of Apartment 5H, at 119 AUDUBON AVENUE, NEW YORK, NY 10032 (Subject Premises) based on the allegation that Respondent is not occupying the Subject Premises as her primary residence. **ANTHONY ACEVEDO** (Undertenant) is Respondent’s son.

PROCEDURAL HISTORY

The proceeding was commenced by issuance of a notice of non-renewal on January 28, 2008. The notice asserted Respondent has not maintained her primary residence at the Subject Premises since January 2005, and that she resided at 527 West 135th Street, Apt. 1D, New York. The notice further asserts that Undertenant lives in the Subject Premises alone, and never resided

in the Subject Premises with Respondent. The notice terminated Respondent's tenancy effective April 30, 2008. The petition is dated May 1, 2008, and the proceeding was originally returnable May 14, 2008. Both Respondent and Undertenant appeared in this proceeding on May 14, 2008, and the proceeding was adjourned for them to obtain counsel.

On July 18, 2008, Respondent remained *pro se*, and although no motion for discovery had been made, Respondent stipulated to provide specified documents to Petitioner, and Respondent stipulated that she would be precluded from offering at trial, any documents that were not turned over to Petitioner by August 15, 2008. The proceeding was scheduled for trial on September 29, 2008, but Petitioner and its counsel failed to appear and the proceeding was dismissed by the Court (Marton, J.).

On October 21, 2008, Petitioner moved to vacate its default. The motion was served only on Respondent, not on the Undertenant or any other named party. The motion was granted on default by the Court (Capella, J) and adjourned to December 2, 2008 for trial. Petitioner was directed to serve and file a copy of the decision with Notice of Entry by November 1, 2008.

On December 2, 2008, Respondent and Undertenant failed to appear, and the Court held an inquest and awarded Petitioner a judgment against Respondent, undertenant and Clara Pena. From December 2, 2008 through June 26, 2009, Petitioner applied repeatedly and unsuccessfully for issuance of the warrant. On June 26, 2009, the warrant issued.

On July 21, 2009, Respondent moved to vacate her default. Respondent asserted that she had suffered a stroke and that she was very ill. Respondent asserted that she had never received the notice to appear back in court. The motion was granted by the Court (Capella, J), the

judgment and warrant were vacated, and the proceeding was restored to the calendar and adjourned to September 10, 2009 for all purposes.

On October 7, 2009, Respondent, Undertenant and Henry Acevedo, Respondent's other son and an occupant of the Subject Premises, agreed to appear for depositions at Petitioner's office on November 4, 2009, and produce documents in support of their defense.¹ The proceeding was adjourned to November 30, 2009. The proceeding was further adjourned to January 12, 2010, for Henry Acevedo's deposition. At this point Mr. Acevedo had not been added to the proceeding as a party, and the proceeding had previously been discontinued against John Doe and Jane Doe. The proceeding was adjourned a third time for Henry Acevedo's deposition to February 26, 2010.

On April 27, 2010, the proceeding was adjourned to May 26, 2010 for an evaluation by Adult Protective Services (APS). The APS referral submitted by the Court indicated that Respondent was 56 years old and had suffered from three strokes, the most recent having been in 2009. The referral noted that Respondent suffered from memory loss, depression and many physical ailments. The referral further noted that Respondent resided with her two sons, and that Henry Acevedo was bipolar and incarcerated at the time of the referral.

On May 26, 2010, the proceeding was adjourned to June 14, 2010. Respondent was seeking to retain Westside SRO Law project to represent her. It was agreed that all outstanding discovery had been completed. The Court file noted that APS was closing the case, because Respondent did not wish to cooperate with APS, after four home visits had been made.

¹ This was the second time the *pro se* litigants had consented to discovery without Petitioner's moving for leave of court.

On June 11, 2010, Respondent appeared by counsel and filed a written answer. The answer asserted that Respondent has maintained the Subject Premises as her primary residence since 1974, when she moved in, and other defenses. The proceeding was adjourned to July 1, 2010 for all purposes. The proceeding was adjourned another ten or eleven dates to November 22, 2011, when it was again scheduled for trial.

On November 22, 2011, the proceeding was transferred from Part X to Part R for trial. The parties stipulated certain documents into evidence. The trial commenced on December 5, 2011, and concluded on December 6, 2011. On December 7, 2011 the Court heard closing arguments and reserved decision.

TRIAL

The DHCR printout for the Subject Building lists Respondent as the regulated tenant of record as of July 27, 2011, at a rent of \$445.03, which appears to be the lowest registered rent in the subject building (Exhibit 1). The last renewal lease executed by Respondent for the Subject Premises is dated January 18, 2004, and runs from a period of May 1, 2004 through April 30, 2006 (Exhibit 2). The documents executed by Respondent indicate that a child under six lived in the Subject Premises, and that Respondent lived there with her husband Sergio Acevedo and her two sons Anthony and Henry Acevedo.

Respondent's lease was deemed renewed by Petitioner for a period through and including April 30, 2008 (Exhibit 3A).

In December 2007, Petitioner's agent Allen Orgel, induced Respondent and her sons to come to his office and provide details about the occupants of the Subject Premises, under the guise of planning to add Respondent's son, Anthony Acevedo, as a tenant of record on the lease.

The meeting was initiated by Mr. Orgel, who used the pretext to run a “skip-trace” on respondents in an effort to gain information for the eviction proceeding Petitioner intended to commence. At the meeting attended by Respondent and Undertenant, Respondent provided Mr. Orgel with her mother’s address, but confirmed that both she and her son lived in the Subject Premises. Mr. Orgel testified that this meeting took place in Spanish, but Respondent and Undertenant dispute this allegation. Instead of adding Undertenant to the lease, Petitioner used the information provided at the meeting by Respondent and her family to issue a Notice of Non-Renewal the following month.

Petitioner’s first witness at trial was Allen Orgel. Mr. Orgel works for the managing agent of Petitioner. Other than testimony about the December 2007 meeting, Mr. Orgel’s direct testimony did not establish any material facts pertinent to Respondent’s residence.

Petitioner’s second witness at trial was Fidel Herrera. Mr. Herrera was employed by Petitioner’s managing agent from October 2011 through May 14, 2010. Mr. Herrera was employed as a managing agent. Mr. Herrera testified that he first visited the Subject Building in 2002. Mr. Herrera testified to one incident that occurred in 2005, which he says led him to believe a taxi driver was residing in the Subject Premises. Mr. Herrera testified that Respondent’s son Henry was there and acting in an agitated manner. Mr. Herrera also saw Respondent at the Subject Premises on that day. Mr. Herrera testified that the 2005 incident resulted in significant water damage to the Subject Premises. Mr. Herrera testified that there was a mattress in the living room, a queen size bed in the bedroom, and that the living room had no furniture. There was a confrontation between Respondent, her family and Mr. Herrera on this occasion.

Mr. Herrera testified that in May 2007, Undertenant was living in the Subject Premises with his wife. Undertenant was communicating with Mr. Herrera at this time and requesting repairs. Mr. Herrera clearly had some personal animosity towards Respondent and her family and testified that they had previously threatened to harm him. Mr. Herrera testified that from 2005 through 2007, he had been to the Subject Premises on approximately five occasions. Mr. Herrera testified that by December 2007, Undertenant's wife was no longer living in the Subject Premises. Mr. Herrera testified that after that Undertenant moved out, and his brother Henry moved in. Mr. Herrera testified that Henry was living alone in the Subject Premises. This testimony is not supported by any other evidence in the record.

Mr. Herrera testified that in 2008 a woman, later identified as Clara Pena was living at the Subject Premises. Mr. Hererra testified that he often saw Respondent in the Subject Building. Mr. Herrera testified he had seen Respondent in the lobby, coming in and out of the building, at tenants' association meetings, in the lobby and in the elevator of the building.

Mr. Herrera testified that Respondent did not live in the Subject Premises from 2005 through May 2010. Petitioner rested after presenting Mr. Herrera's testimony.

On Respondent's case, the first witness to testify was Dulce Acevedo. Respondent testified she was also known under the last name of Maldonado and Rampamberg. Respondent testified she has lived in the Subject Premises since 1974. Respondent has two children Undertenant and Henry Acevedo. Respondent testified that Henry now lives with her in the Subject Premises and Anthony lives on 109th Street. Respondent's husband moved out of the Subject Premises some years prior to the commencement of the litigation.

Respondent testified that Henry was incarcerated for a period and returned to live in the Subject Premises after his release. Respondent testified that Clara Pena is her niece and also lived in the Subject Premises for a period of time.

Respondent testified that she has suffered several strokes and that her most recent stroke was approximately two years ago. Respondent testified she has experienced memory loss as a result of the strokes. Respondent testified that at all times all of her belongings have remained in the Subject Premises and that she keeps them in a closet in the hallway near the bathroom. Respondent pays the rent to the landlord with money orders. Undertenant fills out the information on the money orders submitted.

Respondent testified that there had been many different Super's in the Subject Building, and that the current Super is named Jose, but she did not recall the name of the previous Super. Respondent testified that she receives all her mail at the Subject Premises including the utility bills.

Respondent testified that 527 West 135th Street, Apt 1C was her mother's apartment, but that her mother had since passed away. Respondent testified that from 2005 through 2008, she did not live with her mother, but acknowledged she consistently visited her mother during this period. Respondent's mother was ill during this period and had a home health aide, but Respondent also assisted in her mother's care by providing meals and helping her to bathe. Respondent testified that during these years she slept at her mother's home on a few occasions. Respondent testified she would sleep over if her mother was going to be alone, because her mother was bed bound. Generally, Respondent testified her brother would stay at her mother's

apartment at night. There were also times when Respondent paid a woman to stay at night with her mother.

Respondent received no mail at her mother's apartment, other than a few letters from her sister. Respondent's mother died October 22, 2011. Respondent testified that Clara Pena, her niece, lived in the Subject Premises for a period, but Respondent does not recall when.

Respondent had a joint bank account with her mother, and often used the ATMs close to her mother's apartment to make transactions for this account. These transactions were made at her mother's request and on behalf of her mother. Respondent used the money she withdrew to purchase food and other necessities for her mother

The Subject Premises is a one bedroom apartment. Respondent's testimony on where everyone slept in the Subject Premises during what period was often confused and contradictory, and the Court does not credit her testimony in this regard.

Respondent is not able to read or write in English, and Respondent has great difficulty writing at all since her stroke.

Respondent did some babysitting for children that lived in her mother's building, but the time period that this occurred is unclear.

The next witness for Respondent was Zola Farquharson from Con Edison. Ms. Farquharson produced subpoenaed Con Edison record for the Subject Premises (Exhibit G). The records produced show the Con Ed account for the Subject Premises was opened in 1995. The name on the account is Dulce Acevedo. The records produced only cover a period through 2008. Between 2005 and 2008 some payments for the account were made by internet. Ms. Farquharson testified that Con Edison will not change names on an account and in order to

change the name on an account, the account must be closed and a new account opened. Ms. Farquharson testified no additional account has been opened for the Subject premises since 1995. The documents produced show an email address for the account of Marlymar41@hotmail.com and a phone number of 212-543-1521.

The next witness to testify for Respondent was Undertenant. Undertenant testified he has lived on 109th street for about two years, and before that he lived in the Subject Premises. Undertenant works as a dispatcher for a car service and had the same job between 2005 and 2008. Undertenant testified that between 2005 and 2008 he lived at the Subject Premises with Respondent, Marlene his ex-wife ², and one of his associates from work who was a cab driver. He testified that he and his wife slept in the living room, Respondent slept in the living room on a sofa and Clara slept in the bedroom.

When his associate Rodolfo Luzon was there, he also slept in the living room. Undertenant testified Mr. Luzon only stayed at the Subject Premises for a few months between 2007 and 2008.

From 2005 to 2008 Undertenant assisted Respondent financially with living expenses because she had no income. Marlene had paid the Con Ed bill during this period on the internet on occasion. Undertenant also fills out the money orders submitted to pay rent for the Subject Premises because Respondent has difficulty writings since her strokes.

Marlene moved out in 2008 or 2009 due to tensions between the couple, and Undertenant moved out sometime after that date.

² Although undertenant referred to Marlene as his spouse, and they have a child together, it was later acknowledged they were not actually married.

Undertenant testified that during this period, Respondent was caring for her mother and would leave the Subject Premises very early in the day. Undertenant testified Respondent spent years caring for her mother. Respondent's mother Mariana Maldonado died on October 22, 2010 (Exhibit C). Undertenant visited his grandmother at her apartment from 2005 to 2008, and stated that during the day time Respondent was with his grandmother, and a home attendant came at night. The testimony of Undertenant and Respondent as to what time of day Respondent was caring for her mother conflicted. Respondent testified she cared for her mother late in the day and during the evenings.

Undertenant testified that he met with Mr. Orgel in 2007, with Marlene and Respondent, because Respondent wanted to add Undertenant to the lease for the Subject Premises. Undertenant stated Mr. Orgel agreed to draw up such a lease for the parties, and that he obtained their social security numbers for this purpose. Mr. Orgel told them he needed to do a credit check for the new lease.

DISCUSSION

In order to prevail upon a claim of non-primary residence, Petitioner must establish, by a preponderance of the credible evidence, that Respondent has failed to use the Subject Premises for actual living purposes, and that Respondent lacks a strong, continuing physical connection with the premises (*Toa Construction Co. Inc v. Tsitsires* 54 AD3d 109 [1st Dept 2008]). RSC § 2520.6(u) provides that while no single factor is controlling, the determination may be based on consideration of: 1) whether the tenant lists another address on tax returns, motor vehicle registrations, drivers license or any other documents filed with public agencies; and 2) whether the tenant uses another address for voting purposes; and 3) whether the tenant has spent over 183

days in the premises in the preceding calendar year; and 4) whether the premises have been sublet.

As noted above it is undisputed that Respondent has lived in the Subject Premises for thirty-seven years, since 1974. Respondent maintains a Con Edison account in her name at the Subject Premises (Exhibits G & 12). Respondent and her son Henry Acevedo maintain the Subject Premises as their address for purposes of receipt of government benefits (Exhibits 9 & 10). Respondent's banking records list the Subject Premises as her address (Exhibits 7 ,8, and H). Respondent maintained her medical records at the Subject Premises (*See eg* Exhibit 13). Respondent and Undertenant appeared in Court to defend nonpayment proceedings relevant to the Subject Premises in 2007 and 2008 (Exhibits D & E).

The Court finds that Respondent has an ongoing substantial, physical nexus with the Subject Premises for actual living purposes and has maintained the premises as her primary residence.

The Court notes that there were discrepancies between Respondent's deposition testimony and her testimony at trial. However, given that the deposition of the *pro se* litigant was taken in the landlord's office, without a motion having been made for discovery, and that Petitioner failed to provide Respondent with an official interpreter in Spanish, and the Court gives little to no weight to the deposition (Exhibit 4A).

The Court finds that Petitioner failed to establish by a preponderance of the evidence that Respondent failed to maintain the Subject Premises as her primary residence during the period 2005 through 2008. Petitioner offered little to no evidence in this regard on its *prima facie* case. Petitioner did not prove that Respondent lists another address on tax returns, motor vehicle

registrations, drivers license or any other documents filed with public agencies. Petitioner did not establish that Respondent failed to spend 183 days per year at the Subject Premises or that the Subject Premises were ever sublet to another individual. To the extent that other individuals occupied the Subject Premises they were all family members, primarily Respondent's children, grandchild and a niece. While Petitioner established there was one non family member in the Subject Premises, said individual was a guest of the family for a few months. Petitioner did not establish that the Subject Premises were sublet during the relevant period.

It is clear that Respondent maintained the Subject Premises as a family home from the inception of her tenancy in 1974 forward. The fact that she may have spend a great deal of time with her mother, at a nearby apartment, during the years preceding her mother's death does not mean that she surrendered her home of over thirty years.

While Respondent and Undertenant failed to testify in a consistent matter, this does not require a different result. Discrepancies in Respondent's testimony appear to be largely due to the effects of the three strokes and her resulting loss of memory. It was Petitioner's burden to establish by a preponderance of the evidence that Respondent failed to maintain the Subject Premises as her primary residence on its *prima facie* case. Having failed to do so, Petitioner can not use the discrepancies in the testimony of Respondent and her son, to meet its burden. Notably, Petitioner failed to come forward with any documentary evidence showing Respondent had established a primary residence elsewhere. Even Petitioner's primary witness Mr. Herrera testified that he regularly saw Respondent at the Subject Building during the years in question.

The Court also finds that Petitioner's agent acted in bad faith. The Court views with distaste Mr. Orgel's attempt to build a case against Respondent by claiming he was considering

issuing a lease to include her son. The Court finds Mr. Orgel's admitted use of the social security numbers and other information he obtained at said meeting to instead try to build a case to evict Respondent in bad faith. Additionally, Counsel for Petitioner should have known better than to conduct a deposition of a *pro se* litigant in Spanish without a properly accredited interpreter at the deposition.

Given the failure of Petitioner to sustain its burden of proof on its *prima facie* case the petition is dismissed.

This constitutes the decision and order of this Court.³

Dated: New York, New York
January 10 , 2011

Sabrina B. Kraus, JHC

TO: MARK H. COHEN ESQ
Attorney for Petitioner
2406 Hoffman Street, Suite 3
Bronx, New York 10458
(718) 838-9261

SRO LAW PROJECT
Goddard Riverside Community Center
BY: CATALINA ROSALES, ESQ
51 West 109th Street
New York, NY 10025
(212) 799- 9638

3 Parties may pick up their exhibits from the record room within 30 days, or exhibits will be shredded in accordance with administrative directives.

